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Supreme Court of the United States

OCTOBER TERM, 1959

No. 96

JOHN M. KOSSICK,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

EUGENE UNDERWOOD
Counsel for Respondent

New York, N. Y.
June 8, 1960.

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Authorities Cited:

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Facts and Proceedings Below

Petitioner's presentation is incomplete and misleading. These are the facts:

In 1950 petitioner developed thyroid trouble while chief steward on respondent's ship. He was given a "master's certificate" which entitled him to free treatment at the United States Public Health Service Hospital. While he was a patient there he was chemically burned about the rectum when a strong colonic was negligently administered by Public Health Service Hospital personnel.

This action to recover damages for those injuries was begun on July 20, 1954, too late to sue either the Hospital or respondent in tort. After extensive discovery proceedings, plaintiff, in June 1958, served an amended complaint based on diversity of citizenship. In an attempt to bring himself under the six year statute of limitations, the tort

time having expired, plaintiff alleges that in August 1950 he had made arrangements for treatment with a private physician, which he relinquished upon defendant's oral promise to pay him damages for any injury he might suffer at the Public Health Service Hospital, if he should go there for treatment. As Bicks, *D.J.* said, 166 F. Supp. 571, 573-4:

> "As appears, the first count is bottomed on contract and not on unseaworthiness or the Jones Act, 46 U. S. C. A. §688. This is not an oversight but rather a stratagem to resuscitate a claim time barred under the Jones Act. • • • The amended complaint also contains a count for maintenance and cure. The sufficiency of that count is not questioned upon the instant application."

In answers to interrogatories, plaintiff explicitly waived any claim of unseaworthiness or negligence, Appendix, *infra* p. 7.

Respondent moved to dismiss the amended complaint. Petitioner stipulated that the sole question was whether the amended complaint sets forth a cause of action *in contract* upon which relief may be granted, and renewed his waiver of any claim based upon unseaworthiness or Jones Act negligence, Appendix, *infra* p. 7.

Bicks, *D.J.* granted the motion on the ground that respondent's alleged promise to pay damages for any malpractice of the Hospital, a promise to answer for the default of another, was void under the New York Statute of Frauds, *Kossick* v. *United Fruit Company*, 166 F. Supp. 571.

Subsequently, petitioner discontinued his second cause of action in the amended complaint, which asserted a claim for maintenance and cure, Appendix, *infra* p. 8.

The Court of Appeals affirmed on the ground that petitioner's claim is based solely upon an alleged oral, non-maritime, contract to answer for the default of the Hospital, unenforceable under the New York Statute of Frauds, *Kossick* v. *United Fruit Company*, 275 F. 2nd, 500.

The only question below, as here, was whether such an oral contract can be enforced despite the Statute of Frauds.

Reasons for Not Granting the Writ

There is no conflict with *Union Fish Co.* v. *Erickson*, 248 U. S. 308. The contract there was for service as master of a vessel, plainly maritime. Here, as the Court of Appeals said:

> "The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment."

To be maritime in nature the contract must deal with a maritime service or transaction, commerce or navigation. *Insurance Co.* v. *Dunham*, 11 Wall. 1; *North Pacific SS. Co.* v. *Hall Bros.*, 249 U. S. 119; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; *Pacific Surety Co.* v. *Leatham*, 151 Fed. 440 (7 Cir.); *Eadie* v. *North Pacific SS. Co.*, 217 F. 662; *Berwind-White Coal Co.* v. *City of New York*, 135 F. 2d 443 (2 Cir.). Two other cases are particularly apposite: *Clinton* v. *Int'l. Org. of Masters, etc.*, 254 F. 2d 370 (9 Cir.), and *Mulvaney* v. *Dalzell Towing Co.*, 90 F. Supp. 259.

Even if a contract is maritime in nature, State law is freely applied. In *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, Mr. Justice Black wrote:

"But it does not follow, as the Courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined Admiralty rule" (p. 313).

There this Court held that a maritime contract was controlled by Texas local law in the absence of a federal Admiralty rule.

In *The Tungus* v. *Skovgaard*, 358 U. S. 588, and in *Hess* v. *United States*, 361 U. S. 314, this Court permitted recovery for deaths resulting from maritime torts pursuant to State acts.

In *Romero* v. *International Term. Co.*, 358 U. S. 354, Mr. Justice Frankfurter wrote:

"It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity. 'In the field of maritime contracts,' this Court has said, 'as in that of maritime torts, the National Government has left much regulatory power

in the States.' Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history" (pp. 373-4).

See also *Goett* v. *Union Carbide Corp.*, 361 U. S. 340.

Statutes of Frauds, such as New York's applied below, are found in all the states. They do not conflict with any maritime concept and their application will result in substantial uniformity because of their universality. Statutes of Frauds were long ago conceived as a necessary restraint on a very human tendency to resort to a little "larceny" on occasion to support claims. Seamen have not been noteworthy for any lack of such tendency. To hold Statutes of Frauds inapplicable to such contracts as alleged here would expose a shipping industry already sorely beset by ever-widening liabilities and ever-increasing damage awards to an additional avalanche of fraudulent claims.

CONCLUSION

The petition should be denied.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Respondent

New York, N. Y.
June 8, 1960.

APPENDIX

Interrogatories and Answers

Interr. 12. State specifically the manner and fashion in which it is alleged that the vassel or vessels, were unseaworthy so as to cause injury, illness or aggravation of a pre-existing condition to the plaintiff with respect to each and every illness or injury alleged in the complaint.

Ans. 12. Plaintiff waives any claim of unseaworthiness.

Interr. 14. Enumerate each and every failure on the part of the defendant to take any means or precautions for the safety of the plaintiff or failure to provide the plaintiff with a reasonably safe place wherein to work, resulting in injury, illness or aggravation as alleged in the complaint.

Ans. 14. Plaintiff waives any claim of negligence with respect to a safe place wherein to work.

Stipulation

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that the sole question for determination by the Court upon this motion is whether the complaint, Answers to Interrogatories and examination before trial of plaintiff sets forth a cause of action in contract upon which relief may be granted.

IT IS FURTHER STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that for the purposes of this motion, plaintiff waives any claim or claims arising out of unseaworthiness or the Jones Act.

JACOB RASSNER
Attorney for Plaintiff

THOMAS H. WALKER
Attorney for Defendant

Dated: New York, New York
May 6, 1958

Judgment

The plaintiff having regularly moved this Court for an order directing that judgment be entered dismissing the plaintiff's complaint, * * * it is hereby

ORDERED, that the second cause of action in the within cause be and hereby is discontinued without prejudice and without costs to either party and it is further

ORDERED, that the first cause of action be and hereby is dismissed in accordance with the order of Hon. Alexander Bicks, United States District Judge filed September 10, 1958, and the Clerk of this Court is hereby directed to mark his dockets and enter judgments accordingly.

Dated: New York, N. Y.
March 30, 1959

/s/ G. F. NOONAN
U.S.D.J.

Judgment Entered 3/31/59
HERBERT A. CHARLSON
Clerk